

RECEIVED

May 28 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable H.W. Funderburk, Jr.

Opinion No. 5700 (S.C. Ct. App. Filed December 31, 2019)

GENE B. SCHWIERS.....Petitioner,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL & STEWART W. HEATH OF WHOM

STEWART W. HEATHRespondent.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

BURL F. WILLIAMS, P.A.
Burl F. Williams (S.C. Bar No. 77901)
201 Riverplace, Suite 500
Greenville, South Carolina 29601
864.546.5035
burl@burlfwilliams.com
Attorney for Petitioner

Other Counsel of Record:

Nettles Turbeville & Reddeck
Eugene L. Nettles, III
P.O. Box 699
Lake City, South Carolina 29560
843.374.8511
lee@ntrlaw.com
Attorney for Respondent

S.C. Dept. of Health and Environmental Control
Bradley D. Churdar
1362 Mcmillan Avenue, Suite 400
Charleston, South Carolina 29405
843.953.0213
churdabd@dhec.sc.gov
Attorney for DHEC

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENTS IN SUPPORT OF THE PETITION.....1

 A. The objection letters from Respondent’s neighbors are properly before this court
 1

 B. The court of appeals erroneous interpretation of the word *value* is properly before
 this Court2

 C. The Respondent’s alternative alignment argument is a red herring3

III. CONCLUSION4

I. INTRODUCTION

The Petitioner has identified a glaring defect in the manner that DHEC approves residential dock permits. Further, there are novel issues of statutory interpretation that should be addressed and corrected by this Court. The Respondent's Return provides no basis for this Court to decline to grant the Petition. The Petitioner submits the following Reply in response to a select number of items raised by Respondent in his Return.

II. ARGUMENTS IN SUPPORT OF THE PETITION

A. THE OBJECTION LETTERS FROM RESPONDENT'S NEIGHBORS ARE PROPERLY BEFORE THIS COURT

The Respondent challenges Petitioner's use of opposition letters that Respondent's neighbors submitted to DHEC. (Return, 2.) The ALC stated that these letters, "were examples of documents that were submitted to DHEC and were part of the process and that's what they've been admitted for." App. 39, ln. 1-4. The ALC conducted a hearing to determine whether or not DHEC should have issued the amended permit. Based on the record and testimony before it, the ALC correctly concluded that DHEC should not have issued the amended permit. These opposition letters were a part of the administrative record upon which DHEC's decision was made. Consequently, they are properly before this Court. Indeed, Respondent included them in the record on appeal without objection.

The Respondent's argument that the opposition letters were excluded as hearsay misses the point because the letters were admitted. Just because a document contains hearsay does not end the inquiry. As the Court is well aware, there are numerous exceptions to the rule against admission of hearsay evidence. *E.g.*, Rule 803, SCRE. Indeed, it is entirely possible that the trial court's statement that these letters "were examples of documents that were submitted to DHEC and were part of the process" was a reference to the public records exception found at Rule 803(8), SCRE.

Whether Rule 803(8) or some other exception was properly applied, however, is not before the Court. The Respondent never objected to the introduction of the opposition letters. Rather, it was only DHEC that objected. (Return, 4 (“DHEC objected to the introduction of these letters”); App. 38, ln. 22 – 39, ln. 7). And DHEC chose not to appeal from the ALC’s order. Consequently, the opposition letters are properly before the Court.

**B. THE COURT OF APPEALS ERRONEOUS INTERPRETATION OF THE WORD
VALUE IS PROPERLY BEFORE THE COURT**

The ALC denied the dock permit because it did not comply with the law. App. 10, 14. Specifically, the ALC stated: “This Court finds that the proposed second boatlift, located entirely on Petitioner’s side of the extended property line¹, affects Petitioner’s value and enjoyment by impairing the ability to swim, kayak, and fish from the dock, thereby producing material harm to the policies of the Act.” App. 10; App. 14 (the “proposed location of Heath’s new boatlift violates S.C. Code Ann. 48-39-150(A)(10) and 2 S.C. Code Ann. Regs. 30-11(B)(10) by causing a material harm to the policies of the Act as referenced in 2 S.C. Code Ann. Regs. 30-12(A)(1)(p).”). The court of appeals reversed the ALC by, among other reasons, erroneously interpreting the word “value” to only include “economic value.” The Petitioner challenged the court of appeals decision regarding value in her petition for rehearing. (Petition for Rehearing, 4-5, 7). The Petitioner did not flesh out the court of appeals error in the same manner as she did so in her Petition. Nevertheless, the issue is squarely before the Court. Rule 242(d)(2) provides that “[a] question presented will be deemed to include every subsidiary question fairly comprised therein.” Whether

¹ With the exception of a corner, all of Respondent’s current dock is within Petitioner’s extended property lines. The Respondent’s amended dock permit sought to further move into Petitioner’s extended property lines.

the court of appeals erred in its interpretation of the word value is “fairly comprised” within the questions presented for review.

C. THE RESPONDENT’S ALTERNATIVE ALIGNMENT ARGUMENT IS A RED HERRING

The Respondent’s reference to regulation 30-12(A)(1)(e) and an “alternative alignment” is unavailing and essentially a red herring. The regulation addresses the content of the physical dock permit application. It does not address the legal standard for approving the application. The regulation instructs applicants to include the boundaries and extended property boundaries on the drawing of the proposed dock. S.C. Code Ann. Regs. 30-12(A)(1)(e) (“All applications for docks and piers should accurately illustrate the alignment of property boundaries”). The regulation does authorize DHEC to consider alternative alignments—dock requests that go over boundary lines—where appropriate, but says nothing of the legal standard for ultimate approval. That standard is found, among other places, at regulation 30-12(A)(1)(p):

No docks, pierheads or other associated structures will be permitted closer than 20 feet from extended property lines with the exception of joint use docks shared by two adjoining property owners. However, the Department may allow construction closer than 20 feet or over extended property lines where there is no material harm to the policies of the Act.

S.C. Code Ann. Regs. 30-12(A)(1)(p).

Considering these two regulations together, DHEC can consider an application that would allow a dock to extend across boundary lines, but it cannot allow docks to rest closer than 20 feet to each other if it would cause a material harm to the policies of the Act. As discussed in the Petition, the ALC properly interpreted this regulation and denied the application. The ALC issued factual findings concluding that the location of Respondent’s proposed second boatlift (closer than 20 feet to Petitioner) would cause material harm to the policies of the Act. The court of appeals committed a novel error of statutory interpretation when it reversed the ALC.

III. CONCLUSION

The court of appeals committed multiple legal errors. Accordingly, Petitioner respectfully requests that this Court exercise its discretion and grant the Petition.

May 28, 2020

Respectfully submitted,

BURL F. WILLIAMS, P.A.

s/ Burl F. Williams

Burl F. Williams (S.C. Bar No. 77901)

201 Riverplace, Suite 500

Greenville, South Carolina 29601

864-546-5035

burl@burlfwilliams.com

Attorney for Petitioner